

OPINION
67-225

October 18, 1967 (OPINION)

Mr. Walter Christensen

State Treasurer

RE: State - Highway Department - Cancelled Warrants Revenue

This is in response to your letter in which you call our attention to an opinion issued by this office on February 4, 1966, to the State Highway Commissioner. You specifically call our attention to the fact that the opinion quotes Section 57-27-15.1 as the basis for its conclusion, but such section pertains to depositories and would not apply to the State Highway Department. You further state:

Since this opinion refers to Section 54-27-15.1 which describes the procedure for cancellation of warrants which are drawn on depositories, and since the Highway Department has no depositories as such, does this opinion in fact refer to section 54-27-14 which is the Section under which the State Treasurer is given authority to cancel State warrants? If so, should the State Treasurer be depositing the revenue from cancelled Highway warrant-checks to the credit of the State Highway Department? And if so, from what source should claims against these cancelled warrant-checks be paid?"

Upon reviewing the opinion addressed to Mr. Hjelle, we note that your observation is correct. We further note that the discussion and conclusion in this response are erroneous.

The basic question pertains primarily to situations where services were performed for, or goods delivered to the Highway Department, and payment in the form of warrant check was made, but for some unknown reason the payee never presented the warrant check for payment. Section 54-27-14 states what is to be done in such situations and provides as follows:

54-27-14. CANCELLATION OF OUTSTANDING WARRANTS. The department of accounts and purchases, at the beginning of each fiscal year, shall certify to the state treasurer each warrant more than five years old which remains outstanding and unpaid, and shall show the number and amount thereof, and the fund on which it was drawn. Upon receipt of the certificate, the state treasurer shall issue his receipt for the amount of the outstanding warrants and shall credit such amount to the general fund of this state. Upon receipt of the said state treasurer's receipt, the department of accounts and purchases shall charge the state treasurer with the amount of each warrant described in said certificate and shall cancel the same on its records."

Regarding the above quoted section, note that credit shall be given to the general fund.

Section 54-27-15 states the procedure to be followed where such warrant is subsequently presented for payment and provides as follows:

PROCEDURE WHEN CANCELED WARRANT PRESENTED FOR PAYMENT. If any canceled warrant subsequently should be presented for payment, the holder thereof shall execute a voucher for the amount, to which shall be attached the original warrant, or other satisfactory evidence of ownership of the warrant. The voucher when approved by the department of accounts and purchases and the state auditing board shall be paid by a warrant drawn on the general fund of this state by the department of accounts and purchases and signed by the state auditor."

Regarding Section 54-27-15 quoted above, note that the payment is to be made out of the general fund.

We are cognizant of the Article 56 of the North Dakota Constitution which provides as follows:

1. Revenue from gasoline and other motor fuel excise and license taxation, motor vehicle registration and license taxes, except revenue from aviation gasoline and unclaimed aviation motor fuel refunds and other aviation motor fuel excise and license taxation used by aircraft, after deduction of cost of administration and collection authorized by legislative appropriation only, and statutory refunds, shall be appropriated and used solely for construction, reconstruction, repair and maintenance of public highways, and the payment of obligations incurred in the construction, reconstruction, repair and maintenance of public highways."

We are also aware of the decisions thereon, such as McKenzie County vs. Lamb, 298, N.W. 241, Northwestern Bell Telephone Co. v. Wentz, 103 N.W.2d. 245, and Newman v. Hjelle, 133 N.W.2d. 549.

We are also familiar with the decision in the case of Langer v. State, 284 N.W. 238, as affecting Article 56 and Section 186 of the North Dakota Constitution. The statutory and constitutional provisions as interpreted by the North Dakota Supreme Court could, if construed literally, result in a conflict, particularly if the phrase "credit such amount to the general fund of this state" were to be construed to mean that such money becomes part of the general fund for further disposition by the Legislature without any restrictions. However, in considering the provisions of Section 54-27-15 it is noted that the general fund is obligated to pay the outstanding warrant if presented for payment.

In addition to this, we must assume that the goods were delivered to, or the services were performed for the Highway Department, otherwise the original warrant would not have to be written or issued. This then raises the question: "Is a 'windfall' in any sense deemed a diversion of funds, and if this is a 'windfall', who will be entitled to it?" However, by giving recognition to the statutory and constitutional provisions, and by harmonizing the provisions of both, the phrase "credit to the state general fund", takes on a slightly

different meaning. Under this concept, the crediting to the state general fund would be in the form of a trust or holding the money in escrow for a certain purpose, specifically to be held for future contingencies, such as subsequent presentment of a previously cancelled warrant.

If the construction of this phrase were that the highway funds are absolved of any further obligation, then the general fund would be taxed for a burden which should have been borne by the highway fund where an outstanding previously cancelled warrant is subsequently submitted for payment. This would be the result if a literal construction were to be given to the statutory provisions. However, we must recognize that the Legislature merely provided a general procedure to be followed in such instances and we are convinced that the Legislature did not intend to obligate the general fund for items which rightfully are an obligation of the highway fund.

Where services have been performed for, or goods delivered to the Highway Department, the Highway Department fund is obligated to pay for same. If the money is placed in escrow or in trust with the state general fund, this does not constitute a diversion nor will this give rise to any problem under Section 186 of the North Dakota Constitution.

It is therefore our opinion that, when a cancellation occurs pertaining to warrants written on the highway fund, under the provisions of Section 54-27-14, the State Treasurer credits the amount involved to the general fund to be held in trust or escrow for future payments. His records will indicate the amount involved and, should the cancelled warrant subsequently be presented for payment, the State Treasurer may pay such amount by proceeding in accordance with Section 54-27-15. The opinion dated February 4, 1966 is hereby modified accordingly.

It is further recommended that the Legislature enact clarifying legislation to eliminate the possible confusion that could result under the existing statutes as pertaining to dedicated or special funds.

HELGI JOHANNESON

Attorney General